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ABSTRACT

The free press/fair trial controversy hinges on two distinctions: "decorum" (the general manner in which a trial is comported) vs. "substance" (the actual content of information relating to a trial, including both evidentiary and nonevidentiary information), and behavior within vs. behavior outside of the courtroom. Four major Supreme Court decisions provide evidence of that court's interpretations of those distinguishable terms, and preface a discussion of the court's "Nebraska Press Association et al., v. Stuart" decision. The resulting discussion reaffirms the paradox of maintaining the status quo; news media cannot be given full access to the courtroom because they are disruptive, but news media cannot be denied access because they are indispensable. (RL)

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Empirical Support for Some Major Supreme Court Decisions on Free Press/Fair Trial Conflicts

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Discussion assesses available empirical social science research related to the Free Press/Fair Trial controversy, the area in which First Amendment press freedoms conflict with Fifth, Sixth, and Fourteenth Amendment rights to a fair and impartial trial. The study addresses the concepts of decorum and substance both inside and outside the courtroom, and finds support for four major Supreme Court decisions related to this area. The study concludes with a discussion of Nebraska Press Association et al. v. Stuart and notes how this 1976 decision emphasized the insufficiency of preceding social science research.

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Empirical Support for Some Major Supreme Court Decisions on Free Press/Fair Trial Conflicts

In the decision of Nebraska Press Association et al. v. Stuart, the Supreme Court overturned a judge's gag order related to what the judge considered to be adverse pretrial publicity. Essentially, Justice Burger's opinion for the unanimous court argued that adverse pretrial publicity does not necessarily and inevitably lead to an unfair trial. The thrust of the Court's decision was that while the impact of publicity was speculative, the impact of prior restarint of press freedom was not.[1] Consequently, the thrust of the decision was in favor of the benefits of press freedom over the dangers of adverse publicity. This area where press freedom overlaps with the difficulties of judicial decision-making has become known as the free press/fair trial controversy.

The free press/fair trial controversy is less a point of law and more a point of contention. At this point is one of the few junctures of jurisprudence where conflicting areas of constitutionality have met with the explorations of empirical study. Basically, the free press/fair trial controversy is a point of friction between constitutional claims of a free press under the First Amendment on one hand, and the claims for a fair trial under the Fifth, Sixth, and Fourteenth Amendments on the other.

The First Amendment has become a rallying point for the American news media who insist that the right of freedom of speech must not be abridged in any way. Included among these rights is the right to communicate any and all forms of news concerning legal events.[2]

Opposing this position, the legal community, as embodied in judges and barristers, has argued that the Fifth Amendment -- with its right to due process under the law; the Sixth Amendment -- with its right to public trial by an impartial jury; and, the Fourteenth Amendment -- which is interpreted as extending the Bill of Rights to state cases; all provide that a defendant has the right to a fair and impartial trial.[3] The point of contention is whether a defendant can receive a fair trial under the intense scrutiny of media coverage.

Fundamental to this point of constitutional contention is the almost irreconcilable difference in stylistic approach between the courts and the media. The courts, and their fundamental principle of law, operate as an incremental process. The process is deliberate, and great weight is given to the gradual accumulation of evidence and precedent, so that the process results in a decision that, if it is not clear, is at least preponderant. Media, on the other hand, emphasize speed and flash. News is the fundamental principle of media and news is sudden and ephemeral. News is not accumulated, it is displayed; it is not preponderant, it is available; it is not clear, it is quite simply there.[4] The conflict that arises from these points-of-view pits the eager expressiveness of the news media against the cautious

deliberation of the legal system.

Despite differences in fundamental approaches, both the news media and the legal system have turned to yet another body of intellectual expression to map out their battleground. That other body is what has come to be loosely called empirical social science. Perhaps neither contender trusts this amalgamation of mathematical principle and human complexity, but both contenders seem willing to agree that solutions will not necessarily come from legal theory itself,[5] and that empirical approaches may yield suggestions, if not solutions.

The purpose of this discussion will be to examine available empirical evidence related to the free press/fair trial controversy. This analysis will be centered around four major Supreme Court decisions which preceeded the Nebraska Press Association et al. v. Stuart decision: (1) Estes v. Texas; (2) Sheppard v. Maxwell; (3) Irwin v. Dowd; and, (4) Dickinson v. U.S.. These cases will be fitted within a heuristic framework which can be used to group available empirical studies into conceptually useful categories.

The free press/fair trial controversy can be seen as pivoting around two simple distinctions: decorum v. substance; and, behavior within the courtroom v. behavior outside the courtroom. By decorum, this discussion means the general manner in which a given trial is comported; decorum can be conceived as ranging from dignified to uninhibited. By substance, this discussion the actual content of information relating to any given trial, including both evidentiary and

nonevidentiary information. Finally, this discussion defines the area within the courtroom as the physical area under the trial judge's immediate control. The area outside the courtroom is defined as all physical spaces immediately adjacent to the courtroom, including the corridors which provide physical access to the courtroom.

For purposes of discussion, these two sets of distinctions can be arranged in the following paradigm for the purpose of examining the free press/fair trial controversy:

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TABLE 1 ABOUT HERE
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Note that this paradigm is heuristic, and is not an attempt to exhaust all definitional possibilities.

DECORUM/INSIDE COURTROOM

Within the distinction between decorum and substance, the area of decorum appears to be the more stable and clearly delineated distinction. Although the merits of a case are determined on the substance of the trial, judicial experts are well aware that the decorum -- the atmosphere in which the substance is presented -- may well have an impact on a given case. Accordingly, trial judges are charged with maintaining an aura of calm in judicial proceedings, and that maintenance begins with control of decorum within the courtroom.

Case. The area in which the free press/fair trial controversy spills into considerations of decorum within courtrooms centers around the equipment which can be used to provide trial coverage. What must be balanced in this area is the possibility of noisy and disruptive incursions related to media coverage, against

the serene atmosphere that is deemed indispensible for an impartial trial. In recent history, this concern arose with the circus-like trial of Bruno Hauptmann in the 1930's and achieved an important distillation in Estes v. Texas.[6]

Estes v. Texas (1965),[7] among other contentions, argued that the broadcasting of trial proceedings over the defendant's objections contributed to the violation of the defendant's rights under the due process clause of the Fourteenth Amendment. Speaking for the Court, Justice Clark allowed that while media coverage of a trial is an important function of a democratic society, its exercise was subject to maintaining absolute fairness in the trial procedure. Specifically,, Justice Clark stated that since printireporters could not bring in the distracting equipment of their trade -- namely typewriters and printing presses -- so too, the psychologically distracting equipage of broadcasting could not be used freely without disrupting the necessary air of serenity within the courtroom. Since the decision was not clear cut (the vote was 5-4), the dissenting Justices were able to raise the point that a flat ban of broadcast coverage was not inherent in the decision, but that the concept of an air of impartiality and serenity was viable under the Fourteenth Amendment. Although the decision left the status of broadcasting from the courtroom unclear, it did affirm the concepts of restraint and impartiality as necessary to the conduct of legally sound trials. The crux of the decision was that while mechanics are incidental, a trial's decorum is critical.

Studies. Support in this area comes largely from judicial temperment rather than systematic investigation. Since judicial proceedings are a serious matter, judges have not been inclined to experiment very extensively with the inclusion of mechanical news media within their courtrooms. The prevailing sentiment appears to be the exclusion of mechanical news media until those media can prove that they will not be disruptive.

In a 1958 study of Illinois judges, Cashman and Froke found that the judges had almost no objection to pencil and paper reporting in their courtrooms, but that they generally objected to mechanical media within the courtroom itself (although they did not object to the same media in the corridors outside their courtrooms).[8] Even when broken down in terms of whether the judges had been exposed to demonstrations or discussions about mechanical media in the courtroom, the judges were unchanged in their objections.

But while discussion and demonstration did not seem to alter the attitudes of judges toward mechanical media, experience with those media did bring about changes in attitude. During 1958, Lawton studied 300 attorneys and 30 judges in Oklahoma and found the more exposure these two groups had with mechanical media in the courtroom, the more they tended to favor the presence of those media in the courtroom.[9] By and large, however, members of the judiciary have been reluctant to admit mechanical media to the courtroom.

Rucker studied general sentiments in this area by having a purposive sample Q-sort sets of free press/fair trial

statements, and came to three conclusions (among others): (1) within the study, few people other than journalists were strongly favorable toward virtually limitless First Amendment rights for the press; (2) only those persons related to the judicial area were unalterably opposed to televising trials; and, (3) overall, more support was found for broadcasting trials than was expected.[10] In the absence of evidence to the contrary, the general sentiment of the legal community has been to exclude mechanical news media rather than risk disruption of judicial serenity. Because of lack of evidence to the contrary, the legal community has opted to exclude mechanical media from the courtroom in the interest of preserving judicial serenity and impartiality.

DECORUM/OUTSIDE COURTROOM

The importance of serenity within the courtroom becomes especially salient to the legal community when the decorum inside the courtroom is threatened by more generalized problems of decorum outside the courtroom. Of special importance is situations where an undesirable decorum outside the courtroom spills over into the courtroom. Judges are not only charged with maintaining decorum within their courtrooms, they must also make sure that decorum outside their courtrooms does not disrupt the serenity and impartiality of judicial proceedings.

Case. One important case in which decorum outside the courtroom had an important impact on a trial procedure was in the case of Sheppard v. Maxwell (1966).[11] This case provided an important decision because it involved massive pretrial publicity and an atmosphere of prejudice and rancor related

to news coverage that penetrated the very trial courtroom.

In the days preceding the actual trial, the news media trotted out sordid details from the defendant's life and editorialized in an inflammatory manner. During the trial, the media questioned evidence, debated testimony, and generally conducted public deliberations on the trial and its outcome. All of the jurors except one testified that they had been exposed to this media fusillade before the trial; and, despite being sequestered in a motel during the trial, these same jurors were in daily telephone contact with their families. In reaching a decision, Justice Clark, speaking for the Court, concluded that the entire atmosphere of the trial had precluded the judicial serenity to which the defendant was entitled, and cited the trial's carnival atmosphere among the reasons for remanding the case. The principle involved was quite simple: the prejudicial atmosphere generated by the exercise of First Amendment rights had interfered with the defendant's right to a fair trial. Media coverage had disrupted the trial's serenity.

Studies. The problem of decorum outside the courtroom does not appear to be a pervasive problem in the American judicial system. In a study of jury trial coverage in two Midwestern dailies between 1966 and 1969, Eimermann and Simon found that despite the fact that the seriousness of a given crime increased the likelihood that its associated trial would be covered, no significant difference was found among verdicts for trials which did or did not receive coverage -- the two scholars found no relation among verdicts and publicity overall.[12]

Even sheer volume of publicity did not have noteworthy effects. In a study of a heavily but fairly covered murder case, Riley found little evidence of prejudgement by potential jurors except among those who had no courtroom expereince or those who offered incorrect or fabricated facts about the case.[13] In both studies, despite the presence of publicity that might lead to allegations of prejudice, the results did not indicate judgemental bias resulting from any kind of prevailing community atmosphere. The communities seemed able to absorb or discount media discussions of the trial topics. In the aggregate, little outside impact of mass media coverage was detected.

The results of these studies indicate that the problem of decorum outside the courtroom are related to particular and isolated cases rather than to the general nature of media coverage of jury trials. In terms of decorum, problems appear to relate to single particular trials, rather than to trial coverage per se. In the long run, problems of decorum generated by mass media coverage seem soluble within the procedures which constitute the judicial system. As long as judges exercise discretion in maintaining the necessary air of serenity in judicial proceedings, problems of decorum appear soluble and of only minor importance.

SUBSTANCE/INSIDE COURTROOM

In terms of the distinction between decorum and substance, problems of substance are more germane to general judicial procedure. Areas of substance within the courtroom fall under the rubric of the law of evidence. Detailed examination of

the law of evidence is beyond the scope of this discussion. What is crucial, however, is the existence of a carefully defined set of rules relating to the submission, admissibility, and weight of evidence. These rules have been evolved by the legal community itself and are considered determinative in trial procedures.[14] That which is considered evidence is considered germane to the trial and becomes part of the public record. Responsibility for determining whether an item of information falls within the law of evidence is usually the responsibility of the trial judge. Since a judicial decision must be rendered on the basis of admissable evidence, the trial judge often faces the problem of external (and irrelevant) evidence contaminating the procedure. When the media provide such external evidence, the free press/fair trial controversy becomes involved in substance within the courtroom.

Case. An example of the difficulties attendant upon the emergence of external evidence in a trial situation occured in Irwin v. Dowd (1961).[15] In this case, a parolee arrested other charges had a confession to six murders attributed to him by a county prosecutor. Based on voir dire examinations, the defense challenged all of the jurors on grounds of bias. Citing pre-trial prejudice in this case, Justice Clark, speaking for the Court, enunciated the principle that jurors need not be totally ignorant of the facts and issues involved -- they simply must be able to lay aside their preconceptions and render a verdict on evidence presented in court. The key concept related to matters of evidence reported outside of court was that these matters cannot be used in a decision

unless they have first gone through the filtering process of evidentiary hearing.

Studies. The importance of controlling the use of evidence in rendering a verdict receives acceptable empirical support. In a simulated trial during the 1940's, Weld and Danzig had jurors indicate belief in guilt or innocence at each stage of the trial, and the researcher found that testimony did alter the jurors' certainty during the trial.[16] This finding was replicated (again with a mock jury) by Simon in 1966, when she found that trial experience reduced pretrial prejudice to minimal levels.[17] This result was also found in real trial situations: the Chicago Jury Project in 1959 found that the judge and the jury agreed on the verdict 83% of the time; the times when they disagreed, the judge often had information that was not available to the jury.[18] All in all, the substance of what was presented to the jury in the courtroom had a significant impact on trial outcome. Because of the importance of the evidence available to a jury, trial judges are required to insure that only relevant and admissable evidence is used by the jury in reaching its decision. By carefully controlling the admissibility within the courtroom, trial judges are able to minimize the impact of mass media reporting on the substantial matters of a particular case.

SUBSTANCE/OUTSIDE COURTROOM

An area where a large number of free press/fair trial conflicts occur is in the area of substance outside the courtroom. Since mass media reports in this area can involve reporting of materials that are not germane to the trial at

hand or materials which have not been filtered through the evidentiary process, problems of misused evidence can occur quite readily.

Case. In order to prevent the release of evidence which could prejudice potential jurors, trial judges are able to issue a so-called "gag rule"[19] prohibiting the publication of testimony given in open court. In Dickson v. U.S. (1973),[20] the Supreme Court upheld the power of a Louisiana District Court to formulate such orders. This decision thereby upheld contempt citations issued against two Baton Rouge reporters, but it did not address the issue of prior restraint of news media. The decision was made strictly on the ability of a court to issue such orders and it skirted the related constitutional question. The basis was more judicial mechanics than constitutionality. Concern was with preventing the prejudicing of potential jurors, and not with questions related to First Amendment freedoms.

Studies. The problem of prejudicing potential jurors with news reports has been the subject of considerable study. In a finding replicated by Tans and Chaffee,[21] Wilcox and McCombs noted that a prejudicial report of a confession was a significant factor in increasing a potential jury's belief in a defendant's guilt.[22] Another issue of substance that affected mock jury decisions was a prejudicial report of a defendant's prior record; Kline and Jess found that in a mock trial, among four juries that had been exposed to messages about a defendant's prior record, three recalled the information but did not use it. Perhaps more importantly, however, the

fourth jury used the information and reached a verdict contrary to the other three juries[23] -- a minor, but judicially undesirable deviation. Although only one group had used improper evidence, the single deviation raised the ugly specter of potential jury bias which the judicial system tries to exclude from all cases.

The possible impact of nonevidentiary information about confessions and prior records was not lost on the judiciary either: in a survey of 483 trial judges, Siebert found most of the judges felt that the release of two kinds of information was inappropriate before the trial began: (1) the defendant's prior record; and, (2) any confession before it was accepted as evidence.[24]

The judges' perceptions were supported in research discussed by Connors:[25] in a simulated series of trials conducted by Padewar-Singer and Barton, jurors were more likely to return guilty verdicts if they had been exposed to prejudicial news reports of a retracted confession and of the defendant's prior criminal record. Despite efforts at controlling evidence, the possibility of contamination from mass media reports emerged with a fair degree of strength in the research data. The implication of such data is that release of specific nonevidentiary information about a defendant can prejudice potential jurors in such a way as to harm the defendant. Based on the available evidence, prejudicial reports in the area of <u>substance</u> raise the discomforting possibility of jury contamination despite judicial efforts to maintain a trial's impartiality and serenity.

ASSESSMENT

Based on the empirical research that can be related to four major Supreme Court decisions in the free press/fair trial area, available information indicates that (1) mechanical news media will continue to be excluded from trial procedures until these media can demonstrate that they will not disrupt judicial serenity; (2) problems of decorum can be minimized if trial judges conduct their courtrooms in a manner conducive to judicial serenity; (3) the law of evidence can be used to assure that the defendant will be tried only on evidence relevant to the case at hand; except (4) when prejudicial reports of a confession or a prior criminal record are made before the trial.

This last exception provided the ground upon which Nebraska Press Association et al. v. Stuart was determined. In this particular case, the trial judge opted for prior restraint on the press because of the danger of prejudicial reporting. In rendering a decision on the matter, Justice Burger, speaking for the Court, noted that while pretrial publicity can do injury, such potential injury has not been demonstrated with a degree of certainty necessary to justify restraint. In effect, Justice Burger noted that while empirical support exists for showing the possibility of the dangers of pretrial publicity, the existing and available materials by no means demonstrate the certainty of that danger. The possibility of prejudice exists, but demonstration of such prejudice does not.

Existing social science research has inadvertantly supported

major Supreme Court decisions in the free press/fair trial area. By being unable to demonstrate the mechanical news media will not disrupt judicial serenity, empirical research must needs affirm the exclusion of mechanical news media from the courtroom. By being unable to demonstrate that adverse pretrial publicity will bias a potential jury, empirical research cannot support the use of gag orders by concerned members of the judiciary. In effect, empirical social science finds itself supporting judicial principles not by its presence, but by its absence.

The impact of Nebraska Press Association et al. v. Stuart was to underscore the inadequacy of existing social science research in the free press/fair trial area. In terms of issues related to decorum, this research has not yet demonstrated that news media can be given full access to judicial proceedings without disrupting the serenity of those proceedings. In terms of issues related to substance, this research has not yet demonstrated that pretrial publicity can have an adverse effect on the outcome of a trial. The result is a re-affirmation of the status quo: mechanically, the news media cannot be given full access to the courtroom because they have not proved their worth; conceptually, news media can be given full access to the courtroom because they cannot be proved to be harmful. The result is a paradox: news media cannot be given full access because they are disruptive; news media cannot be denied access because they are indispensible. The task of empirical social science research in the future is to determine whether both, one, or neither of these points-of-view is appropriate.

FOOTNOTES

[1] Nebraska Press Association et al. v. Stuart, 96 S.Ct. 2791 (1976).

[2] Francis L. Dale, "First and Sixth Amendments: Can They Co-Exist?," in Selected Readings: Fair Trial--Free Press, ed. Glenn R. Winters (Chicago: American Judicature Society, 1971), p. 14.

[3] Dale, pp. 11-12.

[4] David L. Grey, The Supreme Court and the News Media. (Evanston, Illinois: Northwestern University Press, 1968), p. 48.

[5] Donald M. Gillmor, Free Press and Fair Trial (Washington, D.C.: Public Affairs Press, 1966), p. 199.

[6] Alfred Friendly and Ronald L. Goldfarb, Crime and Publicity (New York: The Twentieth Century Fund, 1967), pp. 211-215.

[7] Estes v. State of Texas, 85 S.Ct. 1628 (1965)

[8] Gerald Cashman and Marlowe Froke, "Canon 35 as Viewed by the Illinois Judiciary," Free and Fair: Courtroom Access and the Fairness Doctrine, ed. John M. Kittross and Kenneth Harwood (Philadelphia, Pennsylvania: Association for Professional Broadcasting Education, 1970), pp. 31-32.

[9] Sherman P. Lawton, "The Retreat of Canon 35 ... Some Places," Free and Fair: Courtroom Access and the Fairness Doctrine, ed. John M. Kittross and Kenneth Harwood (Philadelphia, Pennsylvania: Association for Professional Broadcasting Education, 1970), p. 41.

[10] Bryce W. Rucker, "What Solutions Do People Endorse in Free Press--Fair Trial Dilemma?," Journalism Quarterly, 44 (Summer, 1967), 240-244.

[11] Sheppard v. Maxwell, 86 S.Ct. 1507 (1966).

[12] Thomas E. Eimermann and Rita James Simon, "Newspaper Coverage of Crimes and Trials: Another Empirical Look at the Free Press--Fair Trial Controversy," Journalism Quarterly, 47 (Spring, 1970), 143-144.

[13] Sam G. Riley, "Pretrial Publicity: A Field Study," Journalism Quarterly, 50 (Spring, 1973), 21-22.

[14] "Law of Evidence," Black's Law Dictionary, ed. Henry Campbell Black, Revised Fourth Edition (St. Paul, Minnesota: West Publishing Company, 1968), p. 658.

[15] Irwin v. Dowd, 81 S.Ct. 1639 (1961).

[16] Free Press and Fair Trial, pp. 201-202.

[17] Walter Wilcox, "The Press, the Jury, and the Behavioral Sciences," Free Press and Fair Trial: Some Dimensions of the Problem, ed. Chilton R. Bush (Athens, Georgia: University of Georgia Press, 1970), p. 65.

[18] Crime and Publicity, p. 92.

[19] Donald M. Gillmor and Jerome A. Barron, Mass Communication Law: Cases and Comment, Second Edition (St. Paul, Minnesota: West Publishing Company, 1974), p. 428.

[20] Dickinson v. United States, cert. den. 94 S.Ct. 270 (1973).

[21] Mary Dee Tans and Steven H. Chaffee, "Pretrial Publicity and Juror Prejudice," Journalism Quarterly, 43 (Winter, 1966), 651.

[22] Walter Wilcox and Maxwell McCombs, "Confession Induces Belief in Guilt: Criminal Record and Evidence Do Not," ANPA News Research Bulletin, 15 (July 7, 1966), 46.

[23] F. Gerald Kline and Paul H. Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," Journalism Quarterly, 43 (Spring, 1966), 114.

[24] Fred S. Siebert, "Trial Judges' Opinions on Prejudicial Publicity," Free Press and Fair Trial: Some Dimensions of the Problem, ed. Chilton R. Bush (Athens, Georgia: University of Georgia Press, 1970), p. 22.

[25] Mary M. Connors, "Prejudicial Publicity: An Assessment," Journalism Monographs, 41 (September, 1975), 22-23.

TABLE 1

Heuristic Paradigm Relating Four Major Free Press/Fair Trial Decisions Rendered by the Supreme Court

	DECORUM	SUBSTANCE
WITHIN COURTROOM	Estes v. Texas	Irwin v. Dowd
OUTSIDE COURTROOM	Sheppard v. Maxwell	Dickinson v. U.S.